UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES CLOUSER,

Plaintiff,

v.

ION BEAM APPLICATIONS, INC.,

Defendant.

/

No. C-03-5539 MHP

MEMORANDUM AND ORDER

Motion for Preliminary Injunction

On December 9, 2003, plaintiff James Clouser ("Clouser") brought this civil action against defendant Ion Beam Applications, Inc. ("IBA"). Clouser seeks declaratory and injunctive relief against defendant for a breach of his employment agreement. Before this court is Clouser's motion for a preliminary injunction. Clouser has filed this motion pursuant to his employment agreement with IBA ("the Agreement"), claiming that the Agreement obligates IBA to pay Clouser's attorneys' fees and litigation expenses in excess of $15,000 immediately, and to pay future legal expenses as incurred. The court has considered the parties' arguments fully, and for the reasons set forth below, rules as follows.

BACKGROUND[1]

Until 1999, Clouser was Chief Executive Officer ("CEO") of SteriGenics. In 1999, during Clouser's tenure as CEO, IBA s.a, the Belgian parent of IBA, acquired SteriGenics. On March 26, 2002, IBA announced that Clouser would be joining IBA as President and Chief Operating Officer ("COO"). To this end, IBA, IBA s.a., and Clouser executed the Agreement on December 8, 2002, making its terms retroactive to April 1, 2002. Dec. of Stephen Adams ("Adams Dec."), Exh. B. Pursuant to the Agreement, Clouser was to receive compensation in the form of an annual salary, stock options, and substantial termination benefits. The Agreement provided that Clouser would receive termination benefits

only if both parties agreed to mutually release one another from all legal claims. Agmt. § 2.3(a). The Agreement also included a mandatory arbitration clause providing, in relevant part:

> 4.4 Arbitration. Employee agrees that any and all disputes that Employee has with Company or any of its employees, which arise out of the Employee's employment, the termination of employment, or under the terms of this Agreement shall be resolved through final and binding arbitration. This shall include, without limitation, disputes relating to this Agreement, any disputes regarding Employee's employment by Company or termination thereof, claims for breach of contract or breach of the covenant of good faith and fair dealing . . . or other claims under any federal, state or local law or regulation . . . concerning in any way the subject of Employee's employment with Company or its termination.

While section 4.4 of the Agreement generally requires disputes to be settled by arbitration, it also allows the parties to seek interim injunctive relief in court in certain circumstances. The Agreement reads:

> Any party to a dispute that is subject to arbitration pursuant to this Section 4.4 shall retain the right to seek from any court having jurisdiction such interim injunctive relief as may be necessary to protect the rights or property of that party pending an arbitrator's final determination.

Agmt. § 4.4. Further, the Agreement discusses allocation of attorneys' fees in the case of an employment dispute between IBA and Clouser. Section 4.8 of the Agreement states in full:

> 4.8 Attorneys Fees. Company shall pay the law firm of Orrick, Herrington & Sutcliffe LLP with respect to the negotiation and preparation of this Agreement (not to exceed US$30,000). With respect to any and all disputes that Employee has with Company or any of its employees, which arise out of Employee's employment or service to the Company, the termination of Employee's employment or service to the Company, or under the terms of this Agreement, Employee shall pay the initial US$15,000 of his legal expenses incurred in any such dispute and the company shall pay for any legal costs or fees incurred in excess of US$15,000. This Section 4.8 will be construed and interpreted in accordance with the laws of Connecticut, United States of America.

Clouser worked for IBA until April 28, 2003, when IBA terminated his employment. Following Clouser's termination, the parties attempted to negotiate amounts and timing of final payments due under the contract. With respect to termination benefits, Clouser agreed only to execute a partial release of his claims against IBA, so no termination benefits were paid.

Throughout the fall of 2003, the parties debated the attorneys' fees question in correspondence between the parties' counsel. Pursuant to section 4.8, Clouser demanded that IBA pay legal expenses incurred through September 2003 (less the agreed-upon $15,000) in the amount of $42,586.41. Adams Dec., Exh. E. IBA eventually acknowledged that it had an obligation to pay attorneys' fees pursuant to

section 4.8 under some circumstances. Dec. of Erik Nelson ("Nelson Dec."), Exh. C. However, IBA claims that it has no obligation to pay the attorneys' fees as Clouser incurs them and, further, that it has a right to offset any attorneys' fees owed to Clouser with the fees Clouser owes to IBA.

On December 2, 2003, Clouser filed a claim against IBA with the American Arbitration Association ("AAA") pursuant to the mandatory arbitration clause in section 4.4 of the Agreement. Clouser's demand for arbitration set forth his claims as follows:

> Claimant James F. Clouser seeks a declaration that he is entitled to certain payments and other benefits from respondent Ion Beam Applications, Inc., a declaration that certain stock options are vested and exercisable by him, damages for breach of contract and breach of the implied covenant of good faith and fair dealing, statutory penalties, costs, and attorney's fees.

Adams Dec., Exh. H. IBA filed an answer and a counterclaim, seeking a determination that it owes Clouser nothing and counterclaiming for recovery of overpayments made to Clouser. Adams Dec., Exh. G. The arbitration is currently pending.

On December 9, 2003, Clouser filed a complaint in this court seeking declaratory and injunctive relief. Among other things, Clouser seeks an injunction compelling IBA to pay his legal fees and costs as they are incurred. Now before the court is plaintiff's motion for a preliminary injunction requiring IBA to reimburse Clouser for attorneys' fees, litigation expenses and interest related to the termination of his employment and to the enforcement of his rights under the Agreement expended to date; Clouser also seeks to compel IBA to pay future attorneys' fees and litigation expenses on a timely basis as they are incurred.

LEGAL STANDARD

I. Arbitration

The Federal Arbitration Act ("FAA") requires federal courts to enforce arbitration agreements and to stay any litigation that contravenes such agreements. See 9 U.S.C. §§ 1-16. The FAA reflects a strong "federal policy favoring arbitration," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), and requires that courts "rigorously enforce agreements to arbitrate." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985). The FAA provides that a written provision in "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of

such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (holding that section 2 covers employment agreements except those with workers engaged in interstate transportation).

Where parties seek to compel arbitration, federal courts have two roles: 1) to determine whether a valid agreement to arbitrate exists; and, if a valid agreement exists, 2) to decide whether the agreement encompasses the dispute at issue. 9 U.S.C. § 4; Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719-20 (9th Cir. 1999). If a valid arbitration agreement does encompass the dispute at issue, then the FAA requires the court to enforce the arbitration agreement in accordance with its terms. See Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). When determining the validity of an agreement to arbitrate, federal courts "apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).[2]

II. Preliminary Injunction

A preliminary injunction is a provisional remedy aimed at preserving the status quo and preventing the occurrence of irreparable harm during the course of litigation. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). Preliminary injunctions may be issued where the moving party has established two prerequisites for equitable relief: 1) a threat of irreparable injury, and 2) the inadequacy of available legal remedies. See Fed. R. Civ. P. 65 (placing this type of injunctive relief within the bounds of the court's discretion and equitable power); Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996). In general, a preliminary injunction is appropriate where a plaintiff can demonstrate "either: 1) a likelihood of success on the merits and the possibility of irreparable injury; or 2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." Southwest Voter Registration Education Project v. Shelley, 344 F.3d 914, 917-18 (9th Cir. 2003) (en banc; per curiam) (citing Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003), and Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999)); see also Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999). The two prongs of this test sit on a "continuum," Southwest Voter, 344 F.3d at 918; thus, "the less certain the

district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." Id. However, "[u]nder either formulation, the moving party must demonstrate a significant threat of irreparable injury, irrespective of the magnitude of the injury." Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist., 868 F.2d 1085, 1088 (9th Cir. 1989). When the plaintiff seeks "mandatory" injunctive relief, the court reviews the motion for injunctive relief more rigorously. Stanley v. Univ. of So. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (holding that the court should not grant mandatory injunctions "unless the law and facts clearly favor the moving party").

DISCUSSION

Before it may consider the substance of Clouser's claim for injunctive relief, the court must first decide whether it can grant injunctive relief in this context. IBA contends that injunctive relief would be improper in this case because the parties agreed to arbitrate the dispute and the dispute is presently before an arbitrator. The court will consider this threshold issue, and the merits of Clouser's motion for a preliminary injunction, below.

I. Availability of Injunctive Relief on the Attorneys' Fees Issue

The parties do not dispute that the Agreement constitutes a valid agreement to arbitrate. Nor do they dispute that the issue of attorneys' fees is arbitrable pursuant to the Agreement. Instead, the essence of the threshold dispute is whether judicially-imposed prospective relief is available in an arbitrable matter.

A. The Parties Contracted to Retain the Option of Injunctive Relief

The Supreme Court has held that the FAA manifests a strong "federal policy favoring arbitration," Moses H. Cone, 460 U.S. at 24, and mandates that courts rigorously enforce agreements to arbitrate. Byrd, 470 U.S. at 221. Notwithstanding this strong preference for arbitration, parties to an agreement may contract on their own terms with regard to arbitration. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."). Under the terms of the FAA, parties are not required to arbitrate when they

have not agreed to do so, nor are they prohibited from excluding certain claims from the scope of the agreement; rather "[the FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contacts, in accordance with their terms." Volt Info. Scis. Inc. v. Bd. of Trustees, 489 U.S. 468, 478 (1989). The parties have included an injunctive relief clause in the Agreement, confirming their desire to permit application of judicial relief where the parties seek to protect "rights or property" under the Agreement. In this action, Clouser seeks to preserve his "right" to have IBA pay his attorneys' fees pursuant to the Agreement; the "property" at issue is the money due him. The injunctive relief Clouser seeks is expressly permitted by the Agreement, and this court may consider Clouser's motion for a preliminary injunction.

B. The Ninth Circuit Permits Judicially-Imposed Injunctive Relief in Arbitrable Disputes

This court also has the authority to consider Clouser's application for preliminary injunction on an alternative ground. In PMS Distributing Co. v. Huber & Suhner, A.G., 863 F.2d 639 (9th Cir. 1988), the Ninth Circuit held that parties may seek certain types of prospective relief in court even after the court has ordered the dispute to arbitration. PMS Distributing addressed facts somewhat distinct from those here, discussing "a writ of possession pending the outcome of the arbitration." Id. at 642. Yet preliminary injunctions are sufficiently analogous to writs of possession to prove PMS persuasive.[3] In fact, the Ninth Circuit relied on cases upholding grants of preliminary injunctions in arbitrable cases to craft its result. Id. at 641-42 (citations omitted). Clouser's motion for preliminary injunction is, thus, properly before this court.

II. Preliminary Injunction

Clouser asks this court to compel IBA to pay the attorneys' fees he has incurred to date and to continue to pay such fees in a timely fashion. Because the relief Clouser seeks would require this court to order IBA to take an affirmative action, rather than enjoining it from taking action, he requests a "mandatory" injunction. See, e.g., Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996). For this reason, the court must ensure Clouser has made a clear showing that he deserves the requested provisional relief.

A. Likelihood of Success on the Merits

IBA argues that Clouser's success on the merits depends upon whether the dispute was properly the subject of a preliminary injunction. As set forth above, that threshold question is separate from the discussion of Clouser's potential success on the merits. The substance of the underlying dispute is simply whether IBA has the contractual duty to pay Clouser's attorneys' fees per section 4.8 of the Agreement. Accordingly, Clouser's eventual success on the merits of this dispute is clear. IBA does not dispute that it has undertaken the obligation to pay Clouser's attorneys' fees in excess of $15,000; it even admitted as much in its pre-litigation correspondence with Clouser. Nelson Dec., Exh. C.

B. Irreparable Injury

Although Clouser's success on the merits is virtually assured, he must still demonstrate that he will suffer imminent, irreparable harm absent injunctive relief. Los Angeles Mem'l Coliseum Comm. v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). Clouser alleges two types of irreparable harm: 1) inability to collect attorneys' fees in the event that IBA becomes insolvent, and 2) inability to vindicate his negotiated rights under the Agreement because of IBA's failure to pay attorneys' fees as negotiated.

1. Impending Insolvency of IBA

It is well-established that monetary injury is not normally considered irreparable. L.A. Coliseum, 634 F.2d at 1202; see also Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). Clouser alleges here an injury that is exclusively economic and, thus, recoverable at law. Where, however, a party seeking injunctive relief for the payment of fees can demonstrate that the defendant is insolvent or will soon become so, that party may still establish irreparable harm. Hilao v. Estate of Marcos, 25 F.3d 1467, 1480 (9th Cir. 1994) ("[A] district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant . . . ."). In such cases, the law provides that injunctive relief is appropriate because the pending insolvency of the defendant would make future remedies at law uncollectible and thus inadequate. Id.

Clouser claims IBA is in severe financial trouble. However, neither in his moving papers nor at oral argument did he set forth proof that IBA will become insolvent during the pendency of the arbitration. The annual report on which Clouser relies presents positive as well as negative financial numbers, and nothing in the report indicates that IBA is on such a rapid decline into bankruptcy that Clouser's award through arbitration will necessarily be uncollectible. Adams Dec., Exhs. K-M. Without concrete evidence that IBA will soon become insolvent, Clouser's assertions that he will suffer immediate irreparable harm amount to no more than speculation. A finding of irreparable harm must be based on more than speculative assertions. See Goldie's Bookstore v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984).

2. Clouser's Inability to Vindicate His Rights Under the Agreement

Clouser argues that IBA's failure to pay his attorneys' fees as he incurs them causes him irreparable harm separate and distinct from purely monetary damages. At stake, Clouser claims, is his right to vindicate his legal rights against IBA. Without IBA paying his attorneys' fees as agreed, Clouser argues, he will be unable to afford to retain counsel of his choice, preventing him from effectively asserting or defending against IBA's legal claims.

Where a party has agreed to facilitate or provide legal representation but fails to do so, the unrepresented party suffers harm. California has acknowledged this harm in the insurance context when determining whether insurers have breached a contractual duty to defend.[4] When enforcing a duty to defend, courts have required insurance companies to defend potential claims in order to ensure that insured parties are not deprived of their bargained-for rights. See, e.g., Buss v. Superior Court of Los Angeles County, 16 Cal. 4th 35, 49 (1997) ("[T]he insurer has a duty to defend the insured as to the claims that are at least potentially covered [because] the insurer has . . . bargained to bear these costs."); see also Scottsdale Ins. Co. v. Homestead Land Development Corp., 145 F.R.D. 523, 532 (N.D. Cal. 1992) (Brazil, Mag. J.) (surveying California insurance cases over four decades to conclude that "individual insureds will be left defenseless as a result of apparently self-serving decisions by carriers to deny a duty to defend pending resolution of substantive coverage issues").[5]

In this regard, there is no difference between a duty to defend and a duty to pay attorneys' fees: Both require immediate action to facilitate or provide legal services lest the ability to advance the claim or

mount the defense be lost. In the context of the duty to defend, Buss stated, "[t]o defend meaningfully, the insurer must defend immediately." Buss, 16 Cal. 4th at 49 (citing Montrose Chem. Corp. of Cal. v. Sup. Ct., 6. Cal. 4th 287, 295-96 (1993)). Likewise, the duty to pay legal expenses requires payment as the legal expense is incurred. Gon v. First State Ins. Co., 871 F.2d 863, 868 (9th Cir. 1989); Okada v. MGIC Indem. Corp., 823 F.2d 276, 280 (9th Cir. 1986).

But the right to receive advance or contemporaneous payment of legal fees does not obtain in every context. Where a party has sufficient financial and legal resources to pursue legal claims without advance payment, the lack of such payment will not necessarily inhibit that party's ability to vindicate her legal rights; thus, harm may not immediately occur. Accordingly, whether IBA's failure to pay Clouser's attorneys' fees as incurred deprives Clouser of the right to vindicate his legal rights depends upon the legal costs involved and Clouser's financial circumstances.

Plaintiffs must demonstrate (rather than merely allege) immediate threatened injury as a prerequisite to preliminary injunctive relief. L.A. Coliseum, 634 F.2d at 1201. In his papers Clouser provided no evidence regarding his own financial circumstances, nor did he indicate his counsel's unwillingness to continue to represent him if he fails to tender legal fees prior to the resolution of the arbitration. In fact, at oral argument, it became clear that both parties have substantial financial resources. As Clouser is currently seeking to repurchase a portion of the SteriGenics business IBA acquired in 1999, Clouser cannot argue that he is impecunious; thus, there is no evidence that Clouser will be unable to vindicate his legal rights under the Agreement without immediate payment by IBA.

Because Clouser's losses from IBA's failure to pay his attorneys' fees do not impair his right to vindicate his legal rights against IBA and because any harm to his right to conduct his legal defense without regard to cost can be compensated by monetary damages, Clouser has an adequate remedy at law and does not suffer irreparable harm. See Goldie's Bookstore, 739 F.2d at 471. In addition, what IBA owes Clouser will be easily measurable at the end of this dispute. This question, like those related to it, is presently before an arbitrator and that arbitrator will resolve this dispute in due course.

C. Balance of Hardships

Clouser claims that, absent a preliminary injunction, he will be forced to expend his own funds in order to vindicate his legal rights under the Agreement and that IBA will draw out litigation in an attempt to force Clouser to bargain away those rights. However, the risks facing the defendant are similar. IBA must also pay its attorneys' fees with the knowledge that it will eventually have to pay Clouser's as well, and Clouser has brought this legal action outside of the arbitration proceeding, driving up those costs. Neither party lacks the cash reserves to proceed with their disputes in any forum, and so the balance of hardships does not tip sharply in Clouser's favor.

III. Clouser is Not Entitled to Injunctive Relief

Clouser chose bring his attorneys' fees dispute to this court after submitting it to arbitration, opting for the harder and more expensive road to resolution of the attorneys' fees dispute. Under the test for preliminary injunction, Clouser has not demonstrated the possibility of some irreparable injury or that the balance of the hardships tips sharply in his favor. Accordingly, no preliminary injunction is warranted and this arbitable dispute shall remain in arbitration.

CONCLUSION

For the foregoing reasons, the court hereby DENIES plaintiff's motion for a preliminary injunction.

IT IS SO ORDERED.

Date: March 18, 2004

/s/
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

ENDNOTES

1. Unless otherwise noted, all facts in this section have been culled from the parties' moving papers.

2. California statutory law provides that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Additionally, so long as it can be done without violating the intention of the parties "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect." Id. § 1643. Furthermore, "[t]he 'clear and explicit' meaning of [contract] provisions, interpreted in their 'ordinary and popular sense' controls judicial interpretation . . . unless it is shown that the parties used the terms in a technical sense or a special meaning is given to them by common usage." AIU Ins. Co. v. Sup. Ct. (FMC Corp.), 51 Cal. 3d 807, 821-822 (1990) (citing Cal. Civ. Code §§ 1638, 1644; Certain Underwriters at Lloyd's, London v. Sup. Ct. (Powerine Oil Co.), 24 Cal. 4th 945, 956, 967 (2001).

3. Specifically, the Ninth Circuit considered cases from the First, Second, and Seventh Circuit. See Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986) (holding that a court may grant provisional relief whenever the tests for such relief are satisfied); Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984) (holding that courts are not absolved of the obligation to consider the merits of a requested preliminary injunction simply because the dispute was to be arbitrated); Sauer Getribe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983) (holding that injunctive relief and the right to arbitrate are not incompatible and affirming the district court's authority to issue injunctive relief while the disputed matter awaited arbitration).

4. There is generally no legal difference between the interpretation of an insurance agreement and any other kind of agreement. California courts have held generally that "[i]f the meaning a layperson would ascribe to insurance contract language is not ambiguous, courts will apply that meaning." Vandenberg v. Superior Court, 21 Cal. 4th 815, 840 (1999); see also Burke Concrete Accessories, Inc. v. Tolson, 27 Cal. App. 3d 237, 241 (1972) ("Absent circumstance indicating a contrary intention, words in a[n insurance] policy are to be construed in their plain, ordinary and popular sense.").

5. The court acknowledges that section 4.8 contains a choice of law clause selecting Connecticut law as controlling law. However, the court has not found any Connecticut law on point, nor has it found anything that contravenes any of the California or Ninth Circuit law cited. Accordingly, the court applies the law of those jurisdictions.